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In the Supreme Court of the United States

OCTOBER TERM, 1986

HOUSTON DAVID HUGHES, D.D.S.,
Petitioner

VERSUS

LOUISIANA STATE BOARD OF DENTISTRY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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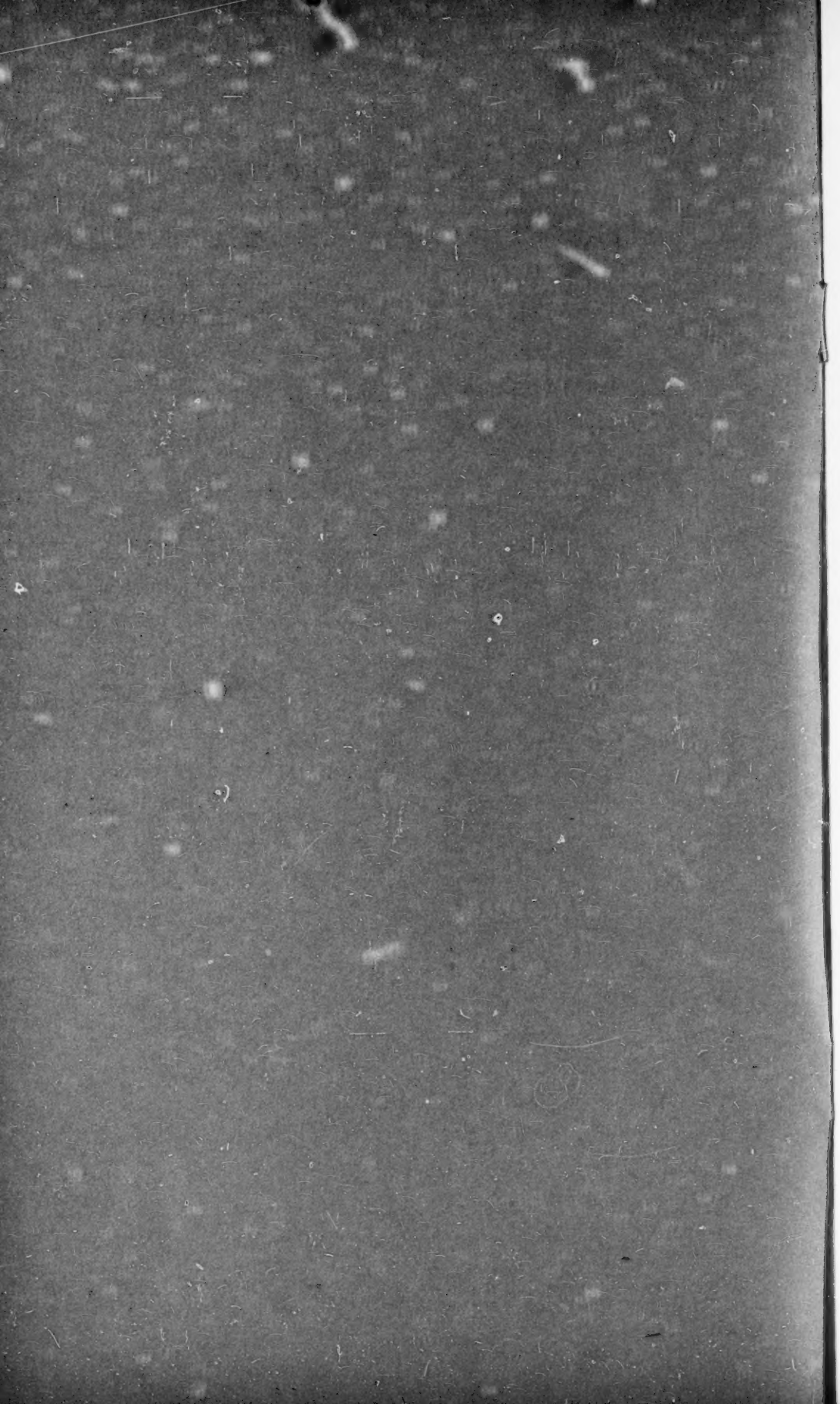

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OPINIONS BELOW

On October 31, 1986 the Louisiana Supreme Court refused petitioner's request that it grant writs of certiorari to the Louisiana Fourth Circuit Court of Appeal.

Respondent herein, Louisiana State Board of Dentistry, respectfully prays that the petition of Houston David Hughes, D.D.S. to review the judgment and opinion of the Louisiana Fourth Circuit Court of Appeal entered on May 12, 1986 be denied.

On May 2, 1986 the Louisiana Fourth Circuit Court of Appeal rendered a decision in the matter of *Hughes vs. Louisiana State Board of Dentistry.* The opinion is reported at 490 So. 2d 1097 (La. App. 4th Cir., 1986). The

Louisiana Fourth Circuit Court of Appeal upheld a judgment of the Civil District Court for the Parish of Orleans, the Honorable Robert Katz, presiding. The lower court's opinion is unreported; however, it is a part of the record in this matter. Judge Katz affirmed the suspension of Houston David Hughes' dental license by the Louisiana Board of Dentistry. Also of record are detailed findings of fact, conclusions of law and a decision issued on December 21, 1984 by the Louisiana State Board of Dentistry.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Honorable Court pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges that the procedure employed by the Lousisiana State Board of Dentistry violated his right to due process of law under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On November 16, 1984, the Louisiana State Board of Dentistry ("Board") caused to be served upon Dr. Houston David Hughes a notice to show cause "why his license should not be suspended, revoked, restricted or limited." The charges contained in the notice to show cause were based upon certain violations of Title 37, Section 776 of the Louisiana Revised Statutes ("The Louisiana Dental Practice Act").

The first charge concerned Dr. Hughes' practice of permitting two (2) dental assistants to engage in the unauthorized practice of dentistry. More specifically, the dental assistants, Linda Chenevert and Dannie Downing, cemented, banded, and wired braces to seven (7) patients. This conduct constitutes professional incompetency, substandard practices for a dentist in Louisiana and unauthorized practice of dentistry in violation of La. R. S. 37:776(7),(8) and (10) which provide:

> "The board may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other limits or restrictions on any dental license or permit issued under this Chapter for any of the following reasons:
>
> (7) Professional or dental incompetency.
>
> (8) Continuing or recurring dental practice which fails to satisfy the prevailing acceptable standards of dental practice in this state.
>
> (10) Employing, procuring, inducing, aiding, or abetting a person not licensed or registered as a dentist to engage in the practice of dentistry; but the person practiced upon shall not be an accomplice, employer, procurer, inducer, aider, or abetter within the meaning of this provision."

The second charge also concerned the unauthorized practice of dentistry. The charge related to the practice of five (5) assistants, Chenevert, Downing, Teresa Butzow, Dianne Boyce and Dorothy McCants. The charge stated that these dental assistants were allowed to "cement, band and wire" braces to patients in violation of La. R. S. 37:776(10).

The third and final charge related to Dr. Hughes' misrepresentations to the general public that he specialized in orthodontics in violation of La. R. S. 37:776(16) which provides:

> "The board may refuse to issue, or may suspend or revoke any license or permit, or impose probationary or other limits or restrictions on any dental license or permit issued under this Chapter for any of the following reasons:
>
> (16) Any conduct intended to deceive or defraud the public."

The record indicates and Dr. Hughes does not dispute that he is not a licensed orthodontist in the State of Louisiana.

The Board origially set Dr. Hughes' hearing for December 8, 1984 pursuant to La. R. S. 37:780. On or about November 19, 1984, Dr. Hughes filed motions to continue that hearing, to quash the charges, and to produce documents. The Board denied these motions. On December 6, 1984, Dr. Hughes retained an additional and/or third attorney, Mr. Arthur Lemann, III, who filed an additional motion to continue the December 8, 1984 hearing. The Board denied that motion as the notice requirement of La. R.S. 37:780 had been satisfied. On December 7, 1984, Dr. Hughes' counsel took discovery depositions of two witnesses (Mrs. Judy Hubert and Christine O'Quinn).

The hearing commenced on December 8, 1984 and continued until the early morning of December 9, 1984. During the course of the hearing the Board heard from fourteen (14) witness, including Dr. Hughes himself. On December 21, 1984, the Board rendered its decision

together with detailed findings of fact and conclusions of law. Six (6) charges were dismissed by the Board's Panel for insufficient evidence. The Panel sustained the other seven (7) charges. The Board suspended Dr. Hughes' license for a period of five (5) years on each count, said suspensions to run concurrently, and fined him $1,000 on each count plus costs, fees and expenses incurred in connection with the hearing. All this was done in accordance with La. R. S. 37:780B.

On January 18, 1985, Dr. Hughes filed a written request for reconsideration and/or a rehearing which was denied on January 21, 1985. Dr. Hughes then filed a Petition for Judicial Review in the Civil District Court for the Parish of Orleans on February 20, 1985, in accordance with the Louisiana Administrative Procedure Act, La. R. S. 49:950 *et seq.* An order staying enforcement of the Board's decision was issued by Judge Katz. On June 28, 1985, the Civil District Court rendered judgment affirming the Board's decision. From this judgment, Dr. Hughes suspensively appealed to the Louisiana Fourth Circuit Court of Appeal. On May 12, 1986, that Court rendered a decision affirming in part and reversing in part the decision of Judge Katz. The Court of Appeal found charge 1, specifications 3, 5, and 7 were duplicative of the other charges and should not have affirmed by the lower court.

Dr. Hughes then sought a writ of certiorari from the Louisiana Supreme Court to review the decision of the Fourth Circuit Court of Appeal. The Louisiana Supreme Court denied Dr. Hughes' request. On January 26, 1987, Dr. Hughes filed with this Honorable Court a Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal. The Louisiana Supreme Court granted Dr. Hughes a stay order suspending the effects of the

Louisiana State Board of Dentistry decision pending this Honorable Court's disposition of the instant petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The decision below by the Louisiana Fourth Circuit Court of Appeal was correct and none of the actions of the Louisiana State Board of Dentistry violated any of Dr. Hughes' rights to substantive or procedural due process of law.

ARGUMENT

Petitioner contends in his statement of the case that Dr. Hughes was the founder and principal owner of "Denta-Care", a program designed to make dental care available to a large segment of the public. The Louisiana State Board of Dentistry is aware of no information to the contrary, and does not argue with that statement. However, the Denta-Care program has absolutely nothing to do with the charges filed by the Louisiana State Board of Dentistry. Petitioner attempts to transform his case into a first amendment case by interjecting a red herring issue, claiming that the Denta-Care program, if in fact it exists, made low cost dental services available to a broad segment of the population. Nowhere in the record does this issue appear, nor was it raised in any of the proceedings below.

Dr. Hughes was sanctioned for holding himself out to the public as an orthodontist when in fact he did not have the requisite ability or training, and for allowing unauthorized persons to practice dentistry.

Petitioner contends that the charges against him were not initiated by the patients; rather the patients were contacted by a detective agency hired by the Board. To support this contention petitioner cites to the Transcript of Hearing, December 8-9, 1984, Vol. III, pages 61-62. However, a close review of the testimony of Joan Chiasson indicates that while she was contacted by a detective agency for the Board, she originally came to the Board's attention through Dr. Thomas Kiebach, a licensed orthodontist in Baton Rouge, Louisiana, *Id.*, p. 62, 1. 4-7, who treated Ms. Chaisson in order to correct the damage done to her teeth by Dr. Hughes.

Petitioner implies that all was well until the Board engaged investigators to pursue him. The Board did initiate the disciplinary procedings by filing formal charges under La. R.S. 37:779. However, as the Court of Appeal found, these charges emanated from complaints of dentists, dental assistants and patients. The Board makes no apology for having thoroughly investigated these complaints before filing charges against Dr. Hughes.

The petitioner seeks to have this case reviewed to determine whether or not his rights to substantive or procedural due process have been violated.

In particular, he contends that his right to due process was violated in that the Board failed to grant his motion to continue his disciplinary hearing and failed to grant him a recess during the proceeding. On November 13, 1984, the Board served a notice to show cause on petitioner as to "why his license should not be suspended, revoked, restricted or limited." It informed Dr. Hughes that a

hearing would be held on said charges on December 8, 1984. Dr. Hughes filed a motion to continue the December 8, 1984 hearing on November 19, 1984, which was denied by the Board. On December 6, 1984, Dr. Hughes retained a third attorney for his defense team, Arthur A. Lemann, III, who filed an additional motion to continue the hearing, which was also denied by the Board.

Petitioner contends that this failure of the Board to grant a continuance somehow denied him procedural or substantive due process of law. In addressing these allegations, the Louisiana Fourth Circuit Court of Appeal reasoned that La. R.S. 37:780A provides for 20 days advance notice of the time fixed for an administrative hearing and stated:

> "The record clearly reflects that such notice was given to Dr. Hughes. The record adequately reflects that counsel for Dr. Hughes was retained even before charges were formally filed and had contacted the Board's special counsel in this regard. None of the charges filed by the Board came as a surprise to Dr. Hughes. Dr. Hughes has made no showing of substantial prejudice by the Board's refusal to grant him a continuance".

The administrative record will clearly reflect that Dr. Hughes received a fair and impartial hearing in that (a) his counsel knew of the formal charges *before* they were filed by the Board, (b) extensive dialogue took place between his counsel and the Board's prosecutor on particulars and details of the charges and specifications filed against Dr. Hughes, (c) his counsel took two (2) discovery depositions of the witnesses Mrs. Judy Hubert and Ms. Christine O'Quinn, (d) he had sole custody and control of the chief documents in the case (all patient records and other

relevant information), and (e) at the administrative adjudication, Dr. Hughes, through his three counsel, effectively cross-examined each witness used by the prosecuting attorney and, presented eight (8) witnesses on his behalf. Moreover, if Dr. Hughes felt that the Board's preadjudication procedures were unreasonable, he had a right to seek interlocutory relief from the state district court pursuant to the Louisiana Administrative Procedure Act. La. R.S. 49:964A.

Petitioner next contends that he was denied due process of law in that his disciplinary hearing began at 10:06 a.m. on Saturday, December 8, 1984 and continued until 3:30 a.m., Sunday, December 9, 1984. It should be pointed out that counsel for Dr. Allen, Mr. Frank Dickerson, had been involved with the case prior to the institution of the formal charges. Mr. Lemann was associated as a third counsel on December 6, 1984, two (2) days prior to the hearing. It is quite clear that Dr. Allen's counsel had an adequate opportunity to prepare a defense and was on specific notice of charges against Dr. Hughes well in advance of the beginning of the hearing. Petitioner selectively quotes from the transcript, in an attempt to show prejudice. A reading of the entire colloquy in context reveals:

> "MR. LEMANN: It's now been 16½ hours, almost 16½, I want the record to be abundantly clear that I don't feel as though I am effectively representing my client. I find that I can no longer concentrate; I an tired, I cannot keep my thoughts in order, and I want the record to so reflect.
>
> MR. WOOTAN: I take exception to that. I think Mr. Lemann is doing a wonderful job, and he and his other two co-counsel, I think, are more than

adequately representing Dr. Hughes, so I take exception with your feeling.

MR. LEMANN: I think your thinking befuddles me now."

Transcript of Hearing, December 8-9, Vol. V, pp. 446-447.

The record will also reflect that at the time of Mr. Lemann's complaint, the examination of witnesses was being handled by one of his two co-counsel, Mr. Dickerson.

"BY MR. DICKERSON:

Q State Your name, please, sir.
A Bobby Hunt.
Q Are you a patient of Dr. Hughes?
A I am.
Q And what is he doing for you now?
A Put braces on my teeth."

Transcript of Hearing, December 8-9, 1984, Vol. V, pp. 446-47.

It should further be noted that after Mr. Lemann's complaint concerning fatigue (at p. 446 of Volume V of the Transcript and cited at page 4 of the Petition), he still fully participated in the proceeding. When co-counsel claimed Mr. Lemann was asleep, Mr. Lemann was awake enough to hold a cigarette and smoke. He was also alert enough, even late in the hearing, to participate repeatedly in the examination of witnesses and making of objections. The assertion at page 11 of the Petition that Mr. Lemann did not so participate is without basis in fact. Questioning and objection by Mr. Lemann appear in the Transcript of Hearing, Vol. V, at pp. 447, 453, 454, 459, 464, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513,

515, 516, and 521. Mr. Lemann was fully awake, participating and still clever enough to attempt to lay out a basis in the record for a subsequent claim of ineffective assistance of counsel.

Although the Civil District Court for the Parish of Orleans stated that a continuance might have been preferable, and the Court of Appeal indicated that the hearing was "quite lengthy," both courts, after carefully reviewing the administrative adjudication record, concluded that the refusal to grant a continuance or a recess was not so arbitrary and capricious as to constitute a violation of the due process clause of the United States Constitution.

PETITIONER'S AUTHORITIES DISTINGUISHED

(A) *Assistance of Counsel.* Petitioner relies principally on criminal law cases in which the refusal of a trial court to grant a continuance did, in fact, operate to deprive a defendant of effective assistance of counsel to which he is entitled under the Sixth Amendment to the United States Constitution. Those cases hold that where a defendant is not allowed a continuance in order to substitute counsel, he is in fact denied a right to choose his counsel, rather than being denied effective assistance of counsel.

It is quite clear that throughout the proceedings between the Louisiana State Board of Dentistry and the petitioner, the petitioner at all times had the right to choose counsel, and, in fact, had three (3) attorneys (two of whom were criminal lawyers) present throughout. Mr. Dickerson, Mr. Irving and Mr. Lemann were present and in fact jointly participated in the hearing.

Petitioner cites this Honorable Court to *Chandler v. Fretag*, 348 U.S. 3 (1954), and *Ungar v. Sarafite*, 376 U.S. 589 (1964), for the proposition that refusal to allow a continuance can result in ineffective assistance of counsel or render the right to defend meaningless. These cases are clearly distinguishable in that Dr. Hughes did not seek to substitute counsel, which might require preparation time by the substitute attorney. Rather, he merely sought to add a third attorney, in addition to two (2) existing attorneys, one of whom had handled the matter prior to the institution of formal charges.

The request to add additional counsel was made two (2) days prior to the scheduled hearing. The members of the hearing panel had allotted time for this public service activity, numerous witnesses had been subpoenaed, and other administrative matters had been scheduled. The last minute effort by Dr. Hughes to add additional counsel and request a continuance was more properly considered a dilatory tactic in light of the fact that he already had two attorneys representing him in this matter. The Board simply had to balance competing interests of public health and safety versus the petitioner's enjoyment of a third attorney.

(B) *Procedural Due Process.* Petitioner next contends that the actions of the Board somehow deprived him of procedural due process in that he was not afforded an opportunity to be heard. He quotes from *Powell v. Alabama*, 287 U.S. 45 (1932):

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it

> reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the contitutional sense."

The Louisiana State Board of Dentistry does not take issue with this statement. The Board agrees that Dr. Hughes had a right to be heard and to be represented by counsel, if he so chose, and that both rights constitute fundamental requirements of due process.

In *Daniels v. Williams,* ____ U.S. ____, 106 S. Ct. 662 (1986), this Honorable Court held that there were two basic components to due process. One is procedural due process, which encompasses notice and a right to be heard. *Fuentes v. Shevin,* 407 U.S. 67 (1972). The second is substantive due process, which protects individuals from certain arbitrary governmental actions, regardless of the fairness of the procedure through which the action takes place. *Moore v. East Cleveland,* 401 U.S. 494 (1977).

In the instant case, Dr. Hughes was not denied procedural due process in that he received actual and constructive notice at least twenty (20) days prior to the hearing and he was allowed to be heard through his three (3) attorneys. The Louisiana Administrative Procedure Act provides for prehearing discovery (depositions, interrogatories, etc.). La. R.S. 49:956. Dr. Hughes in fact engaged in prehearing discovery by taking the depositions of two witnesses. Additionally, if he believed that the discovery period was inadequate, he could have filed a petition for review of preliminary agency action with the district court under La. R.S. 49:964. It is quite clear that the petitioner had adequate procedural safegards available to him. Dr. Hughes was given every opportunity via his attorneys to

participate in pretrial discovery. Additionally, the transcript of the hearing will reflect that Dr. Hughes testified twice on his own behalf. It is respectfully submitted that Louisiana State Board of Dentistry did not violate Dr. Hughes right to fundamental procedural due process in that he was given notice and a fair opportunity to be heard. Dr. Hughes was allowed to testify and have the counsel of three (3) attorneys.

(C) *Substantive Due Process.* Likewise the petition fails to show how Dr. Hughes was deprived of substantive due process. The record reveals that evidence was presented that Dr. Hughes allowed untrained, unlicensed personnel to perform dental procedures in violation of the Louisiana Dental Practice Act.

States have been granted broad powers in policing the licensing and activity of the professions. *Barsky v. Board of Regents*, 347 U.S. 442, 74 S. Ct. 650 (1954); *Lewis v. Flynt*, 439 U.S. 438, 99 S. Ct. 648 (1979). This Court has consistently held that the states and those fellow professionals charged with judging professional conduct must be granted discretion. In *Barsky*, this Court stated:

> "It is elemental that a state has broad powers to enforce standards of conduct within its borders relative to the health of everyone there... The state's discretion in that field extends naturally to the regulation of all professions concerned with health."

It is respectfully submitted that the decision of the Louisiana State Board of Dentistry was not arbitrary or capricious but was carefully made after reviewing extensive evidence of violations of a code of professional conduct, to wit, the Louisiana Dental Practice Act, concerning

the treatment of dental patients. These professionals must be granted discretion in determining the proper practice of the profession to protect the health and safety of the citizens of Louisiana.

Finally, the evidence that Dr. Hughes did in fact violate the Dental Practice Act by allowing non-licensed individuals to practice dentistry in his office is overwelming. Clearly, a finding by his fellow professionals that he violated their code of conduct, after receiving extensive evidence and allowing Dr. Hughes to present a defense, was not arbitrary and capricious. The members of the hearing panel found in their professional judgment that Dr. Hughes' actions in fostering and inducing the unauthorized practice of dentistry required sanctions.

CONCLUSION

It is respectfully submitted that the petitioner has wholly failed to sustain his burden of establishing under Rule 17 of the Rules of the United States Supreme Court that there are special and important reasons why a writ should be granted. The decision of the Louisiana Fourth Circuit Court of Appeal did not involve any questions of federal constitutional law that were improperly handled by the state courts. It is clear that the state courts addressed the issue and found that the Board did not act arbitrarily and capriciously, nor did the Board violate any of Dr.

Hughes' due process rights.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court representing the Respondent herein and that three copies of the above Brief of Respondent in Opposition were served upon Paul Baier, counsel for Petitioner, Dr. Houston David Hughes, by mailing same first class postage prepaid, addressed to his office at 4222 Hyacinth Avenue, Baton Rouge, Louisiana 70808, this 26th day of February, 1987. I further certify that all parties required to be served have been served.

GUY WOOTAN
Counsel for Respondent